

Baker Hostetler

Baker & Hostetler LLP

12100 Wilshire Boulevard
15th Floor
Los Angeles, CA 90025-7120

T 310.820.8800
F 310.820.8859
www.bakerlaw.com

September 9, 2011

John F. Cermak, Jr.
direct dial: 310.442.8885
jcermak@bakerlaw.com

VIA HAND DELIVERY

Mr. Valmichael Leos, EPA Project Coordinator
U.S. Environmental Protection Agency, Region 6
Superfund Division (6SF-RA)
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Re: Administrative Settlement Agreement and Order on Consent for Removal Action
between the United States Environmental Protection Agency ("EPA"),
McGinnes Industrial Maintenance Corporation and International Paper
Company, San Jacinto River Waste Pits Site (the "Site"), U.S. EPA Region 6
CERCLA Docket No. 06-12-10 ("AOC") – Notice of Dispute Pursuant to Section
XVI of the AOC

Dear Mr. Leos:

This letter is submitted on behalf of International Paper Company and
McGinnes Industrial Maintenance Corporation (collectively, "Respondents").
Respondents are in receipt of a letter dated August 5, 2011 from EPA Region 6 to
David Keith, Ph.D., of Anchor QEA, Respondents' TCRA Project Coordinator, that was
received by Dr. Keith on August 11, 2011 ("August 5 Letter").

This letter serves as Respondents' notice of dispute pursuant to Section XVI of
the AOC with respect to the August 5 Letter, including each and every claim of non-
compliance with the AOC set forth in the letter and EPA Region 6's contention that the
alleged instances of non-compliance identified in the August 5 Letter entitle it to seek
stipulated penalties under the terms of the AOC.

The August 5 Letter alleges that the Respondents have failed to comply with the
terms of the AOC by failing to meet certain interim "deadlines" contained in a
construction schedule "approved" by EPA on December 15, 2010 ("Schedule"). EPA
contends that the instances of alleged non-compliance included in the August 5 Letter
provide a basis for the imposition of several million dollars in stipulated penalties on
Respondents. This is even though (1) Respondents have met each and every of the
"compliance milestones" identified in Paragraph 76.b of the AOC, (2) Respondents
complied with the Project Schedule (negotiated and approved by EPA) contained in
Section IV of the Statement of Work attached as Appendix D to the AOC, and (3)

Chicago Cincinnati Cleveland Columbus Costa Mesa
Denver Houston Los Angeles New York Orlando Washington, DC

103912599.4



641974

Respondents completed the TCRA construction ahead of the original projected completion date. Respondents accomplished these feats notwithstanding the *force majeure* events that delayed their ability to gain access necessary to perform the TCRA.

In prior notices of dispute under the AOC ("Dispute Notices"), Respondents have addressed the reasons why the Schedule cannot provide a basis for a violation of the AOC or the imposition of stipulated penalties on them. This contention, as well as the other grounds on which Respondents dispute the allegations of non-compliance or liability for stipulated penalties set forth in the August 5 Letter, are set forth in the attachment to this letter ("Attachment").

As noted in the Attachment, the Schedule was intended as a tool to guide this complex construction project. To work toward an overall construction completion date, specific activities had to be assigned "start" and "finish" dates, with the expectation that those dates would be adjusted to reflect the realities of the construction process. The approved Removal Action Work Plan ("RAWP") to which the Schedule was attached, clearly explained Respondents' intent with respect to this Schedule. TCRA construction was completed earlier than the projected completion date, even though Respondents encountered access issues that delayed some activities and required major changes in construction planning. Yet EPA Region 6 is asserting that it is entitled to stipulated penalties for events such as delay in completing the delivery of a particular type of stone to the TCRA worksite (*i.e.*, 91 days of penalties because the delivery of "natural stone," scheduled to be completed by April 12, 2011 under the Schedule, was not completed until July 12, 2011). EPA Region 6 claims that this "violation" subjects Respondents to stipulated penalties of up to \$5,000 per day – a total of more than \$350,000 – even though the alleged late delivery of this material had no impact on the completion of TCRA construction. This "violation" is only one of 21 separate instances of non-compliance listed in the August 5 Letter, none of which involve any delay in completing the TCRA but as to which EPA Region 6 claims that its contract with Respondents entitles it to more than \$4.9 million in stipulated penalties. The assertion of a right to stipulated penalties under such circumstances and for such a "violation" is entitled to careful scrutiny under the terms of the parties' contract, the AOC, which, as Respondents have noted in their Dispute Notices, imposes on EPA Region 6 an obligation of good faith and fair dealing.

In addition, the August 5 Letter lists three instances of non-compliance related to submission of plans by Respondents' construction contractor - the contractor's project work plan ("Contractor's Work Plan"), the contractor's site specific health and safety plan ("Contractor's HASP") and a quality assurance project plan ("Contractor's QAPP," and collectively, "Contractor Plans"). These submissions must be distinguished from submissions that Respondents were required to and did submit under the AOC, such as the health and safety plan that Respondents were required to submit and did submit as part of the "compliance milestones" identified in Paragraph 76.b of the AOC. The stipulated penalties that EPA Region 6 asserts are associated with the alleged late submission of the Contractor Plans ("Alleged Contractor Plan Violations") are in the amount of \$542,000.00.

The August 5 Letter is the fifth in a series of letters issued by EPA alleging violations of the AOC related to the Schedule. EPA Region 6, however, never

previously advised Respondents of any violations associated with the claimed late submission of the Contractor Plans. Thus, Respondents had no ability to remedy the Alleged Contractor Plan Violations. Moreover, there is no basis for contending that the Contractor Plans were not timely submitted, given that they depended on the specifics of access and thus could not be completed until the details of access were resolved in late January 2011. The Contractor Plans were submitted within days after the access issues were resolved. The bases on which Respondents dispute the Alleged Contractor Plan Violations are set forth in the Attachment.

The August 5 Letter closes with the statement that "[t]he EPA encourages Respondents to increase their efforts in order to meet the deadlines for completion of the removal work activities under the AOC." August 5 Letter at 7. Respondents used their best efforts to comply with the AOC and its construction deadlines from the AOC's effective date until the completion of construction. In fact, Respondents began working on obtaining the necessary access even before the AOC was signed. Moreover, once the impasse over access was resolved, the Respondents employed a six day work week and took every step at every turn to speed the process of construction and to meet their contractual obligations under the AOC. Respondents view EPA's attempt to impose stipulated penalties under the circumstances here to be inconsistent with EPA's own contractual obligations of good faith and fair dealing under the AOC and to be without justification particularly given the role that EPA itself played in the delay in obtaining access and in refusing to approve changes to the Schedule to reflect (1) the delay in obtaining access, and (2) changes made to the Removal Action Work Plan which were approved by EPA.

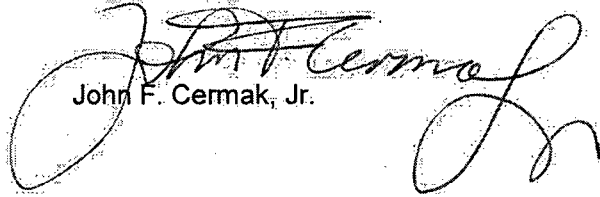
For purposes of this notice, Respondents incorporate by reference, as if fully set forth herein, and rely upon the following: (1) their notice of *force majeure* dated December 30, 2010 and supplemental submissions thereto dated January 4, 2011, January 5, 2011 and January 28, 2011 ("Respondents' *Force Majeure* Letters"); (2) Respondents' letters dated June 1, July 1, July 30, September 30, November 1 and November 30, 2010 and January 5, 2011 describing their "best efforts" to obtain access ("Respondents' Best Efforts Letters"); (3) the submission being made by Respondents, which responds to a letter from EPA dated February 16, 2011 denying their *force majeure* claim and addresses the basis for Respondents' *force majeure* claim and their claim for interference with and breach of the AOC ("Access Submission"); and (4) the Dispute Notices, which are contained in Respondents' letters dated February 14, 2011 ("February 14 Notice of Dispute"), February 22, 2011 ("February 22 Notice of Dispute," and collectively with the February 14 Notice of Dispute, the "February 14 and 22 Notices of Dispute"), March 18, 2011 and April 4, 2011 ("April 4 Notice of Dispute"). Respondents reserve the right to further supplement this notice and also rely upon submissions that they have made to EPA regarding the Schedule and proposed revisions to the Schedule, including without limitation, submissions dated February 4, 2011 and February 23, 2011. They also rely upon and incorporate other documents contained in the administrative record for the AOC, and such future submissions as they may make under the AOC.

Respondents are in receipt of a letter from EPA's counsel dated March 11, 2011 regarding the February 14 and 22 Notices of Dispute. Based on that letter, as well as subsequent communications with EPA's counsel, Respondents understand EPA's position to be that any notice of dispute with respect to the August 5 Letter is premature

and is not required to be made until such time as EPA seeks to assess stipulated penalties with respect to the instances of alleged non-compliance set forth in the August 5 Letter. Respondents are nonetheless submitting this notice of dispute to ensure that their objections with respect to the August 5 Letter are preserved.

If you have any questions regarding Respondents' notice of dispute with respect to the matters set forth above, please do not hesitate to call me or Al Axe, counsel for McGinnes Industrial Maintenance Corporation.

Sincerely,



John F. Cermak, Jr.

JFC :nlw
Enclosures

cc: Barbara Nann (via hand delivery)
Jessica Hernandez (via e-mail)
Anne Foster (via e-mail)
Samuel Coleman (via e-mail)
Donald Williams (via e-mail)
Albert R. Axe (via e-mail)
Sonja A. Inglin (via e-mail)